

Can Public Facing Businesses Deny Entry Based on Vaccination Status?

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MAY I DENY A CUSTOMER OR CLIENT ENTRANCE TO MY BUSINESS?

YES BUT. Business owners concerned about customers or clients entering their place of business without proof of a COVID-19 vaccine should be mindful of their obligations under Title III of the Americans with Disabilities Act. Specifically, Title III prohibits discrimination on the basis of disability in the activities of places of public accommodations (businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards. 42 U.S. Code § 12182 *et seq.*

While Title III has general restrictions that businesses have to abide by when they choose to deny accommodations, a business may deny goods or services to individuals if their participation would result in a “direct threat” to the health and safety of others, but only when this threat cannot be eliminated through an alteration of policies, practices, procedures, or providing auxiliary aids and services. See 42 U.S.C.A. § 12182 (b)(3).

Unsurprisingly, there is no precedent applying the law of public accommodations to an individual's inoculation status. And though no court has yet said that the “direct threat” provision of Title III will be an affirmative defense to public accommodation discrimination, the analogous “direct threat” provision of Title I of the ADA, concerning employment discrimination, has been held to be an affirmative defense. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78 (2002) (interpreting 42 U.S.C. § 12113(b)); see also *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (§§ 12113(b) and 12132(b)(3), of Titles I and III, are “parallel provisions”). Still the Equal Employment Opportunity Commission, analyzing the analogous provisions under Title I, has said that under the ADA, a “direct threat requirement is a high standard.” See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC Guidance, available at <https://www.eeoc.gov/es/node/131879>.

WHAT IF A CUSTOMER REFERENCES HIPAA?

HIPAA does not prohibit businesses or employers from requesting health information, including information about vaccination status. Rather, HIPPA protects the disclosure of such by the provider.

Here is why:

HIPPA applies to the following:

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Health plans

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Health care clearinghouses

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Health care providers who conduct certain financial and administrative transactions electronically. These electronic transactions are those for which standards have been adopted by the Secretary under HIPAA, such as electronic billing and fund transfers.

WHAT ARE MY OBLIGATIONS BEFORE DENYING A CUSTOMER OR CLIENT ENTRANCE TO MY BUSINESS?

Businesses would be wise to apply the same three step review of their policies and procedures that they would with their customers and clients under Title III, as they would with their employees under Title I.

First, businesses should make an individual assessment before turning away a customer or client. In determining whether a customer or client poses a direct threat to the health or safety of others, a business must make an individualized assessment, based on reasonable judgment, that relies on current medical knowledge or on the best available objective evidence, to ascertain:

STEP 1: The business must identify the specific risk posed by the individual.

Here, the inquiry is whether the unvaccinated customer or client will expose others to COVID-19.

STEP 2: Once the risk is determined, then the business must look at the four factors of whether the “direct threat” actually exists:

1.

Duration of the risk;

2.

Nature and severity of the potential harm;

3.

Likelihood that the potential harm will occur; and

4.

The imminence of the potential harm.

28 C.F.R. § 36.208(b). Businesses should consult with counsel when conducting this four-pronged assessment.

Second, businesses should balance these factors before turning away a customer or client. When balancing factors relevant to determine whether the risk to health or safety of others is significant, each factor does not need to be significant on its own; rather, the gravity of one factor might compensate for the relative slowness of another. See 42 U.S.C. § 12182(a), (b)(3); See also *Montalvo v. Radcliffe*, 167 F.3d 873, 878 (4th Cir. 1999).

Third, businesses should recognize that just as they do under Title I, they maintain a duty to try an accommodation first (before finding a direct threat). If the business determines that the customers and client would pose a significant risk to the health and safety of others, then it must determine “whether reasonable modifications of policies, practices, or procedures will mitigate the risk,” 28 C.F.R. § 36.208(c), to the point of “eliminat[ing]” it as a “significant risk.” 42 U.S.C. § 12182(b)(3).

Under the ADA, a failure to make a reasonable modification is itself an act of discrimination unless the business can demonstrate that implementing the modification would fundamentally alter the nature of their business. See 42 U.S.C. § 12182(b)(2)(A)(ii).

BOTTOM LINE:

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Businesses can deny customers and clients entrance to their businesses if they are unvaccinated.

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Businesses must make individualized assessment and balance those factors before denying unvaccinated customers and clients entrance to their business.

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Businesses are required to try an accommodation if it would not alter the nature of their business before denying unvaccinated customers and clients entrance to their business.

Again, businesses should consult with counsel on issues relating to vaccination of customers and clients. This is a nuanced issue and additional guidance and rules are anticipated.